MOTION FILED

APR 16 2004

(8)

No. 03-377

# In the Supreme Court of the United States

**KOON BUICK PONTIAC GMC, INC.,**

*Petitioner,*

v.

**BRADLEY NIGH,**

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

WILLIAM A. NEWMAN
JAMES MINNIS
NATIONAL AUTOMOBILE DEALERS ASSOCIATION
8400 Westpark Drive
McLean, Virginia 22102
(703) 821-7041

PAUL R. NORMAN
*Counsel of Record*
BOARDMAN, SUHR, CURRY & FIELD LLP
One South Pinckney Street
Fourth Floor
Madison, Wisconsin 53703
(608) 257-9521

*Counsel for* Amicus Curiae *National Automobile Dealers Association*

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

## MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Under Rule 37 of the Rules of this Court, the National Automobile Dealers Association (NADA) moves for leave to file the accompanying brief in support of the Petitioner's request that the underlying decision by the United States Court of Appeals for the Fourth Circuit be reversed. Counsel for petitioner has consented to the filing of the accompanying brief. Counsel for the respondent has been asked to so consent, but has not done so.

NADA is a nonprofit national trade association of new motor vehicle dealers. It has approximately 20,160 members located in all 50 of the United States. NADA frequently appears in litigation as *amicus curiae* in cases raising important issues to its members or their customers.

The issue before the Court in this case is whether, under 15 U.S.C. § 1640(a)(2)(A), the statutory damages for violations of the Truth in Lending Act (TILA) in consumer credit transactions, other than leases or closed-end credit secured by real property or a dwelling, are subject to minimum and maximum limits of $100 and $1,000, respectively. This issue is of paramount importance to NADA members, who regularly act as creditors in motor vehicle sales finance transactions subject to TILA and not secured by real property or a dwelling. Absent the imposition of the maximum limit of $1,000 on statutory damages for TILA violations in these transactions, NADA members will be liable for such damages in an amount equal to two times the amount of the finance charge in a particular transaction.

As illustrated by the present case, this amount can be $20,000 or higher in a single transaction, regardless of whether the customer can show any actual damage from the violation and regardless of whether the creditor intended the violation or to harm the customer in any way. If

the underlying decision that the maximum limit of $1,000 on statutory damages no longer applies to these transactions is affirmed by this Court, it will have an extraordinary adverse economic impact on NADA members and their customers by increasing the costs of motor vehicle credit transactions throughout the nation in order to provide huge windfalls to a few consumers involved in credit transactions where unintentional, technical violations of TILA occur. If the underlying decision is reversed, consumers will still be able to recover the full amount of actual damages that they suffer as a result of a TILA violation, plus statutory damages of up to $1,000 and their attorney's fees.

Because its members are directly and materially affected by TILA, NADA has been involved in monitoring the development, enactment, amendment, enforcement and interpretation of that statute since before its original creation in 1968. This experience gives NADA a unique perspective from which to assist the Court in reaching the correct decision on the issue of statutory interpretation before it.

Therefore, NADA respectfully asks that this motion be granted.

Respectfully submitted,

PAUL R. NORMAN
*Counsel of Record*
BOARDMAN, SUHR, CURRY & FIELD LLP
One South Pinckney Street
Fourth Floor
Madison, Wisconsin 53703
(608) 257-9521



WILLIAM A. NEWMAN
JAMES MINNIS
NATIONAL AUTOMOBILE
DEALERS ASSOCIATION
8400 Westpark Drive
McLean, Virginia 22102
(703) 821-7041

*Counsel for* Amicus Curiae *National Automobile Dealers Association*

## QUESTIONS PRESENTED

Whether the $1,000 statutory limit originally adopted in 1968 as a cap on Truth in Lending Act (TILA) recoveries under 15 U.S.C. § 1640(a)(2)(A)(i) has been rendered inapplicable to that subpart by subsequent amendments to Section 1640(a)(2)(A)—though there is no evidence of any Congressional intent to effect such a change—so that parties who suffer no actual damages may now recover far in excess of the previous $1,000 cap.

## TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED ..... i

TABLE OF AUTHORITIES ..... iv

INTEREST OF THE AMICUS CURIAE ..... 1

STATEMENT ..... 1

A. Statutory Background ..... 1

B. The Decision Below ..... 5

SUMMARY OF ARGUMENT ..... 6

ARGUMENT ..... 9

I. THE PLAIN MEANING OF THE STATUTE IS THAT "SUBPARAGRAPH" REFERS TO ALL OF SECTION 1640(a)(2)(A) ..... 9

II. EVEN IF SECTION 1640(a)(2)(A) IS AMBIGUOUS, RULES OF STATUTORY CONSTRUCTION REQUIRE A FINDING THAT CONGRESS INTENDS THE $100/$1,000 STATUTORY DAMAGE LIMITS TO APPLY TO ALL TILA VIOLATIONS EXCEPT THOSE SPECIFIED IN SUBPART (iii) ..... 11

A. Section 1640(a)(2)(A) May Be Reasonably Construed As Applying The $100/$1,000 Limits On Statutory Damages To All TILA Violations Except Those Specified In Subpart (iii) ..... 11



B. The Legislative History Of Section 1640(a)(2)(A) Makes It Clear That The $100/$1,000 Limits Apply To Statutory Damages For All TILA Violations, Except As Provided In Subpart (iii) ..... 13

C. Construing Section 1640(a)(2)(A) To Apply The $100/$1,000 Limits To Statutory Damages For All TILA Violations, Except As Provided In Subpart (iii), Is Consistent With The Statute's Purpose And Avoids An Absurd Result ..... 15

CONCLUSION ..... 20

## TABLE OF AUTHORITIES

**Cases** PAGE(S)

*Atlantic Mut. Ins. Co. v. C. I. R.*,
523 U.S. 382 (1998) ..... 11

*Cowen v. Bank United of Texas*,
70 F.3d 937 (7th Cir. 1995) ..... 3, 16, 19

*Dryden v. Lou Budke's Arrow Fin. Co.*,
661 F.2d 1186 (8th Cir. 1981) ..... 3

*Duncan v. Walker*,
533 U.S. 167, 172 (2001) ..... 9, 13

*Griffin v. Oceanic Contractors, Inc.*,
458 U.S. 564 (1982) ..... 15

*Hughes Aircraft Co. v. Johnson*,
525 U.S. 432 (1999) ..... 11

*Mars v. Spartanburg Chrysler Plymouth, Inc.*,
713 F.2d 65 (4th Cir. 1983) ..... 3, 5

*Morissette v. United States*,
342 U.S. 246 (1952) ..... 9

*Murphy Bros. v. Michetti Pipe Stringing*,
526 U.S. 344 (1999) ..... 15

*Purtle v. Eldridge Auto Sales, Inc.*,
91 F.3d 797 (6th Cir. 1996) ..... 3, 19

*Robinson v. Shell Oil Co.*,
519 U.S. 337 (1997) ..... 12



*Strange v. Monogram Credit Card Bank of Ga.*,
129 F.3d 943 (7th Cir. 1997) ..... 5. 14

*United States v. Cleveland Baseball*,
532 U.S. 200 (2001) ..... 12

*Watkins v. Simmons & Clark*,
618 F.2d 398 (6th Cir. 1980) ..... 19

**Statutes and Regulations**

15 U.S.C. §§ 1601-1666 ..... *passim*

Consumer Leasing Act of 1976,
Pub. L. No. 94-240,
90 Stat. 257 (1976) ..... 2

Truth in Lending Act Amendments of 1974,
Pub. L. No. 93-495, § 408,
88 Stat. 1500 (1974) ..... 2

Truth in Lending Amendments of 1995,
Pub. L. No. 104-29, § 6,
109 Stat. 271 (1995) ..... 4

12 C.F.R. Part 213 ..... 16

12 C.F.R. Part 226 ..... 1, 16

**Other Authorities**

141 CONG. REC. H9513,
H9516 (daily ed. Sept. 27, 1995) ..... 4

141 CONG. REC. S14566,
S14568 (daily ed. Sept. 28, 1995) ..... 4

H.R. REP. NO. 90-1940 (1967),
reprinted in 1968 U.S.C.C.A.N. 1962, 1976 ..... 2

H.R. REP. NO. 104-193, at 99 (1995) ..... 4

S. REP. NO. 94-590 (1976) ..... 3, 14, 17

Reed Dickerson, *Legislative Drafting*,
73-74 (1977) ..... 9

James Craig Peacock,
*Notes on Legislative Drafting* 12 (1961) ..... 9

http://xml.house.gov/subparagraph.html ..... 9

http://www.nada.org/content/navigationmenu/
nadadata/20033/nadadata_profile.pdf ..... 18



## INTEREST OF THE AMICUS CURIAE

The interest of amicus curiae is described in the accompanying motion for leave to file this brief.[1]

## STATEMENT

### A. Statutory Background

The Truth in Lending Act (TILA) was originally enacted in 1968. Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601-1666 (2003)). Its basic purpose was, and is, to require creditors to give consumers certain disclosures regarding consumer credit transactions prior to their consummation in order for consumers to evaluate the cost of credit. 12 C.F.R. § 226.1(b). The requirements of TILA are contained in both the statute and in Regulation Z (12 C.F.R. Part 226), which has been promulgated by the Federal Reserve Board under the authority granted it by TILA.

Initially, TILA applied to both closed-end and open-end consumer credit transactions, but did not apply to consumer leases. In the original statute, Congress created a statutory damage provision which provided:

> Section 1640(a) Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this chapter to be disclosed to that person is liable to that person in an amount equal to the sum of

---

[1] Pursuant to Rule 37.6 of the Rules of this Court, counsel for *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members or its counsel has made a monetary contribution to the preparation or submission of this brief.

> (1) twice the amount of the finance charge in connection with the transaction, except that the liability under this *paragraph* shall not be less than $100 nor greater than $1,000; and
>
> (2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

Consumer Credit Protection Act § 100(a); *see* H.R. REP. No. 90-1940 (1967), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1976 (emphasis added). Thus, at the beginning, it was clear that Congress intended that statutory damages in all TILA transactions were subject to a floor of $100 and a cap of $1,000, regardless of the amount of the finance charge. It was also clear that the term "paragraph" referred to 15 U.S.C. § 1640(a)(1).

In 1974, Congress amended the civil damage provision to allow for recovery of actual damages in addition to statutory damages and to deal with statutory damages in class actions. *See* Truth in Lending Act Amendments of 1974, Pub. L. No. 93-495, § 408, 88 Stat. 1500, 1518(1974); 15 U.S.C. § 1640(a)(1). Section 1640(a)(1) was renumbered as Section 1640(a)(2)(A) and the word "paragraph" was changed to "subparagraph." Following this amendment, it remained clear that the $100/$1,000 limits on statutory damages applied to all consumer credit transactions and that the word "subparagraph" now applied to all of 15 U.S.C. § 1640(a)(2)(A).

In 1976, Congress passed the Consumer Leasing Act, which applied TILA protections to consumer leases. Consumer Leasing Act of 1976, Pub. L. No. 94-240, 90 Stat. 257 (1976). At that time, § 1640(a)(2)(A) was amended by dividing it into two subparts —subpart (i) which contained the original language "(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction . . ." and subpart (ii) stating "(ii) in the case



of a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease . . . ." Following both of these subparts and separated from them by a comma, Congress retained the phrase ". . ., except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000 . . . ." The purpose of this amendment was to provide a separate measure of statutory damages for consumer leases because "[t]he formula for individual penalty recoveries in Truth in Lending (twice the finance charge in the transaction) is inappropriate for violations of [the Consumer Leasing Act] since leases generally do not contain identifiable finance charges." S. REP. NO. 94-590, at 8 (1976). The measure of damages for leasing violations was set at 25% of the total monthly payments under the lease, which "amount is intended to represent a civil penalty equivalent in dollar amount to that imposed on other creditors." *Id.*

Subsequent to this amendment, the courts, including the Fourth Circuit, interpreted the phrase "except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000" as continuing to apply to all of subparagraph (A) and not just to subpart (ii) relating to consumer leases. *Mars v. Spartanburg Chrysler Plymouth, Inc.,* 713 F.2d 65, 67 (4th Cir. 1983); *see also Purtle v. Eldridge Auto Sales, Inc.,* 91 F.3d 797, 800 (6th Cir. 1996); *Cowen v. Bank United of Texas,* 70 F.3d 937, 941 (7th Cir. 1995); *Dryden v. Lou Budke's Arrow Fin. Co.,* 661 F.2d 1186, 1191, n.7 (8th Cir. 1981). Accordingly, violations of TILA in connection with motor vehicle sales finance transactions and other consumer credit transactions continued to result in statutory damages of no less than $100 and no more than $1,000.

In 1995, Section 1640(a)(2)(A) was again amended by the addition of a third subpart which provided "(iii) in the case of individual action relating to a credit transaction not

under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000." Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, § 6, 109 Stat. 271, 274 (1995). The purpose of this amendment was to raise both the minimum and maximum limits on statutory damages in the case of closed-end credit transactions secured by real property or the consumer's dwelling. *See* H.R. REP. NO. 104-193, at 99 (1995); 141 CONG. REC. S14566, S14568 (daily ed. Sept. 28, 1995) (statement of Sen. Mack); 141 Cong. Rec. H9513, H9516 (daily ed. Sept. 27, 1995) (statement of Rep. McCollum). With this amendment, the statute now reads:

> (a) [A]ny creditor who fails to comply with any requirement imposed under this part, . . . with respect to any person is liable to such person in an amount equal to the sum of —
>
> . . .
>
> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000 . . . .

After the 1995 amendment of § 1640(a)(2)(A), the Seventh Circuit ruled that the phrase "except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000" still applied to statutory



damages under both subparts (i) and (ii) of subparagraph (A). *Strange v. Monogram Credit Card Bank of Ga.*, 129 F.3d 943, 947 (7th Cir. 1997). In doing so, the court rejected the assertion that, by adding subpart (iii) to raise the limits on statutory damages for closed-end credit transactions secured by real property or dwellings, Congress somehow intended to remove those limits completely for all other consumer credit transactions, except consumer leasing. *Id.*

### B. The Decision Below

In the present case, the Fourth Circuit addressed the same question that had been ruled on in *Strange* and, by a 2 to 1 majority, answered the question exactly the opposite from the Seventh Circuit. (Pet. App. 1a-22a.) The majority opinion of the Fourth Circuit acknowledged that, prior to 1995, the term "subparagraph" in the phrase "except that liability under this subparagraph shall not be less than $100 nor greater than $1,000" had been interpreted by its decision in *Mars* and in other circuits' decisions to apply "to the whole of subparagraph (A)." (Pet. App. 11a.) However, according to the majority, following the 1995 amendment, it was necessary to interpret "subparagraph" to mean only subpart (ii) of subparagraph (A) "so as not to render meaningless the maximum and minimum articulated in (iii)." (*Id.*) The court went on to state:

> It could well be . . . that Congress did not intend to alter the statutory cap applicable under subparagraph (A)(i) when it amended the statute in 1995. However, the critical point of law—and it is critical—is that we do not know what Congress intended; all that we have before us is the amended statute from which to determine intent. And, based upon that statute, the far better, and indeed compelled, interpretation is that Congress did alter the statutory cap *regardless of its intent*. It is the statute, not any inferential intent, that

> constitutes the law. Of course, it goes without saying, if Congress enacted into law something different from what it intended, then it can simply amend the statute to bring the statute in line with congressional intent.

(Pet. App. 13a.) (Emphasis added.)

In his dissent, Judge Gregory noted that the term "subparagraph" was used to refer to subparagraph (B) in § 1640(a)(2)(B) relating to limitations on damages in class actions and, therefore, should be construed to refer to all of subparagraph (A) when used in that subparagraph, as it had prior to the 1995 amendment. (Pet. App. 21a-22a.) Judge Gregory argued that it was not necessary to interpret "subparagraph" to mean only subpart (ii) in order to give meaning to subpart (iii) and that the only internally consistent construction of subparagraph (A) was to apply the $100/$1,000 limits to subparts (i) and (ii) and to interpret subpart (iii) as setting higher limits ($200/$2,000) for closed-end credit transactions secured by real property or a dwelling. That is, subpart (iii) creates an exception to the general limitations of $100/$1,000 imposed on statutory damages for TILA violations. (*Id.*) Otherwise, "the inclusion of the phrase 'under this subparagraph' would [itself] be superfluous; the meaning of (ii) would be unchanged by its deletion." (Pet. App. 21a.)

## SUMMARY OF ARGUMENT

When used in the federal statutes, the term "subparagraph" references the third-level subdivision of a statutory section that begins with a capitalized letter. Therefore, the plain meaning of "subparagraph" in the phrase "except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000" is that it refers to all of § 1640(a)(2)(A) and not only to subpart (ii).



Even if the statute were ambiguous, it would be necessary to construe the statute to apply the $100/$1,000 limits on statutory damages to subpart (i) because of the context of the statute, its legislative history and purpose, and the absurd circumstances that will result from the alternative construction.

The word "subparagraph" is used in § 1640(a)(2)(B) in a context that clearly refers to all of subparagraph (B). The presumption that identical words used in different parts of the same act are intended to have the same meaning, therefore, favors construing the word "subparagraph" in § 1640(a)(2)(A) as also referring to all of that statute. This construction also is necessary to avoid rendering the phrase "under this subparagraph" in § 1640(a)(2)(A) superfluous. The fact that the various subparts of § 1640(a)(2)(A) are not intended to be read in isolation from one another is evidenced by the fact that subpart (iii) has no separate measure of damages for the transactions described in that subpart and is obviously intended to borrow the measure of damages contained in the other subparts.

In addition, the legislative history of the statute presents a strong case that Congress has always intended that statutory damages for TILA violations in consumer credit transactions subject to subpart (i) of § 1640(a)(2)(A) be subject to the $100/$1,000 limits. This was the uniform interpretation given the statute by the courts even following the creation of subpart (ii) in 1976 to provide a separate measure of damages for TILA violations in consumer leases, which resulted in the clause containing the $100/$1,000 limits becoming separated from subpart (i). The 1995 amendment that created subpart (iii) did not make any material change in the existing statutory language. There is nothing in the language or history of that amendment which even hints at a Congressional intent to remove all limits on statutory damages for TILA violations in transactions governed by subpart (i). Such an intent would have

been inconsistent with the goal of the 1995 amendment to impose higher statutory damage limits under subpart (iii) for TILA violations in closed-end transactions secured by real property or a dwelling than the limits for violations in other consumer credit transactions.

Perhaps most significant is that the Fourth Circuit's determination that Congress removed the limits on statutory damages for violations in transactions governed by subpart (i) will create absurd results. Under this construction, an automobile dealer who unintentionally fails to disclose required information in connection with a consumer credit sale of a motor vehicle will be liable for an amount equal to twice the finance charge in the transaction, which, as the present case shows, can be $20,000 or higher, even if the nondisclosure causes the consumer no harm. However, a failure to disclose required information in a consumer lease of a motor vehicle will subject the dealer to statutory damages no higher than $1,000. There is no rational basis for Congress wishing to impose statutory damages in consumer credit sales that are 20 or more times higher than the statutory damages imposed in consumer lease transactions.

Also, in the case of many automobile dealers, their liability for statutory damages in individual actions subject to § 1640(a)(2)(A) will exceed the limits on their total liability for statutory damages in class actions which are capped by § 1640(a)(2)(B) at 1 percent of the dealer's net worth. It is extremely doubtful that Congress intended this result.

Even more absurd is the fact that a creditor's liability for statutory damages in a consumer credit sale or loan will be capped at $2,000, if the sale is secured by real estate or a dwelling, and, therefore, brought under subpart (iii), but unlimited up to twice the amount of the finance charge in a transaction not secured by real estate or a dwelling.



Congress could hardly have intended to create substantially lower statutory damage liability in credit sale or loan transactions where consumers have put their homes at risk than in transactions not secured by real estate.

## ARGUMENT

### I. THE PLAIN MEANING OF THE STATUTE IS THAT "SUBPARAGRAPH" REFERS TO ALL OF SECTION 1640(a)(2)(A).

In construing a statute, this Court begins with the language of the statute. *Duncan v. Walker*, 533 U.S. 167, 172 (2001). In this case, the issue before the Court turns on the meaning of the word "subparagraph" in § 1640(a)(2)(A).

An issue not addressed in the opinion below is whether the term "subparagraph" has a fixed meaning in federal legislative drafting. If it does, that meaning should be adopted. *Morissette v. United States*, 342 U.S. 246, 263 (1952) (terms of art in a statute are to be taken in their technical sense).

According to the United States Congress Data Dictionary of Legislative Documents, the word "subparagraph," when used in federal statutes, references the third-level subdivision of a statutory section that begins with a capitalized letter. *See* Official House of Representatives website at http://xml.house.gov/subparagraph.html (defining the term "subparagraph"); Reed Dickerson, *Legislative Drafting*, 73-74 (1977); James Craig Peacock, *Notes on Legislative Drafting* 12 (1961). Proper use of the word "subparagraph" is illustrated by the 1974 amendment to the statute which renumbered it from § 1640(a)(1) to § 1640(a)(2)(A) and, simultaneously, changed the phrase "under this paragraph" to "under this subparagraph." *See* Truth in Lending Act Amendments of 1974, Pub. L. No. 93-495, § 408, 88 Stat.

1500, 1518(1974). The fact that Congress carefully switched the reference from "paragraph" to "subparagraph" when the designation of § 1640(a)(1) was changed to § 1640(a)(2)(A) demonstrates that Congress understood the fixed, technical meaning of "subparagraph," which refers to a statutory section that begins with a capitalized letter.

This meaning is also supported by the normal use of the word "clause" in federal legislation to refer to subparts within a statute which are designated by lowercase roman numerals within parentheses, such as "(i)", "(ii)", etc. *See* Official House of Representatives website at http://xml.house.gov/subparagraph.html (defining the term "clause"). If Congress intended the $100/$1,000 limits in § 1640(a)(2)(A) to refer only to subpart (ii), it would have used the phrase "under this clause" instead of "under this subparagraph" in stating those limits.

Given this fixed meaning of "subparagraph," it is not possible to reasonably construe that term in § 1640(a)(2)(A) to refer to anything other than all of subparagraph (A). The conclusion of the Fourth Circuit's majority opinion that the meaning of "under this subparagraph" was changed in 1995 to refer only to subpart (ii) of subparagraph (A) is inconsistent with the technical meaning of "subparagraph." The only construction of the statute consistent with this meaning is the determination in the Fourth Circuit's dissenting opinion that the $100/$1,000 statutory damage limits apply to all TILA violations, except for the "specific carve-out from the general rule for real-estate transactions" created by subpart (iii). (Pet. App. 22a.)



## II. EVEN IF SECTION 1640(a)(2)(A) IS AMBIGUOUS, RULES OF STATUTORY CONSTRUCTION REQUIRE A FINDING THAT CONGRESS INTENDS THE $100/$1,000 STATUTORY DAMAGE LIMITS TO APPLY TO ALL TILA VIOLATIONS EXCEPT THOSE SPECIFIED IN SUBPART (iii).

Applying its plain meaning, the word "subparagraph" refers to all of § 1640(a)(2)(A); thus, there is no need to engage in further statutory construction to answer the question presented in this case. *Hughes Aircraft Co. v. Johnson,* 525 U.S. 432, 438 (1999) (where the statutory language provides a clear answer, the statutory analysis ends there.) Even if this were not the case, the rules for construction of ambiguous statutes require a finding that Congress intends the $100/$1,000 statutory damage limits to apply to both subparts (i) and (ii) of subparagraph (A). As discussed below, the Fourth Circuit's majority opinion erred by rejecting this construction as implausible and failing to even try to discern Congress' true intent by applying well-established rules for construing ambiguous statutes. When these rules are considered, it becomes clear that Congress intends that the $100/$1,000 limits apply to both subparts (i) and (ii), even if such intent were not required by the plain meaning of the word "subparagraph."

### A. Section 1640(a)(2)(A) May Be Reasonably Construed As Applying The $100/$1,000 Limits On Statutory Damages To All TILA Violations Except Those Specified In Subpart (iii).

The primary rule of construction of statutes is to ascertain and declare the intention of the legislature. *Atlantic Mut. Ins. Co. v. C. I. R.*, 523 U.S. 382, 387 (1998). The Fourth Circuit's majority opinion conceded that Congress

may well have intended to apply the $100/$1,000 limits on statutory damages to both subparts (i) and (ii) of Section 1640(a)(2)(A). (Pet. App. 13a.) However, the majority felt compelled to ignore this potential intent and to apply a purportedly literal construction to the statute which presumed that the statute was capable of no other reasonable construction than to apply these limits only to subpart (ii). (Pet. App. 11a.)

The Fourth Circuit's majority opinion's analysis must be rejected because it is reasonable to construe Section 1640(a)(2)(A) as applying the $100/$1,000 limits on statutory damages to both subparts (i) and (ii). Not only does the technical meaning of the term "subparagraph" support this construction; the context in which it is used in the statute does also. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (whether a particular statute is ambiguous is determined by reference to the language itself, the specific context in which is used, and the broader context of the statute as a whole).

The term "subparagraph" in § 1640(a)(2)(A) must be viewed in the context of the use of the identical term in § 1640(a)(2)(B), where "subparagraph" clearly and unambiguously refers to all of subparagraph (B). Therefore, it is reasonable to construe "subparagraph" in subparagraph (A) as referring to all of that subparagraph and not only to subpart (ii). *United States v. Cleveland Baseball*, 532 U.S. 200, 213 (2001) ("It is generally presumed that identical words used in different parts of the same act are intended to have the same meaning . . .").

Also, as noted in the Fourth Circuit's dissenting opinion, if "subparagraph" were intended by Congress to refer only to subpart (ii), there would be no need to include the phrase "under this subparagraph" at all. The only purpose that "under this subparagraph" serves in subparagraph (A) is to clarify that the $100/$1,000 statutory damage limits apply



to all liability under subparagraph (A), except for liability in real estate transactions for which subpart (iii) specifies limits of $200/$2,000. The fact that the only construction of the statute that gives meaning to the phrase "under this subparagraph" is the one that applies the $100/$1,000 limits to both subparts (i) and (ii) demonstrates that is not just a reasonable construction, but the preferred one as a result of the "cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant." *Duncan*, 533 U.S. at 174.

In addition, the fact that, if read in isolation, subpart (iii) provides no measure for statutory damages in transactions secured by real estate demonstrates that the individual subparts of subparagraph (A) are not intended by Congress to stand alone. The only way the $200/$2,000 limits under subpart (iii) can be given meaning is to assume that the measures of damages in the other subparts are applicable to the transactions described in subpart (iii), subject to the higher $200/$2,000 limits. If it is reasonable to construe subpart (iii) by referring back to the other subparts for the applicable measure of damages, then it is also reasonable to construe the language setting forth the $100/$1,000 limits as referring back to both subparts (i) and (ii).

### B. The Legislative History Of Section 1640(a)(2)(A) Makes It Clear That The $100/$1,000 Limits Apply To Statutory Damages For All TILA Violations, Except As Provided In Subpart (iii).

Prior to 1995, the courts had uniformly applied the $100/$1,000 limits to both subparts (i) and (ii) of

§ 1640(a)(2)(A). *Strange,* 129 F.3d at 947. This construction was consistent with the history of the statute up to that time. The $100/$1,000 limits were inserted in the original statute and clearly applied to statutory damages for all TILA violations. When consumer leasing was added in 1976, subparts (i) and (ii) were created to delineate different measures of statutory damages for individual actions relating to a consumer lease (25 per centum of the total lease payments), and for other individual actions (twice the amount of the finance charge). These two subparts were then followed by the $100/$1,000 limitation language which was said to apply to all liability "under this subparagraph." There was no indication that by adding to § 1640(a)(2)(A), a new statutory damages measure for violations of the newly created Consumer Leasing Act, Congress intended to remove the $100/$1,000 limits from other TILA violations and to apply them only to leases. Rather, the legislative history revealed that Congress intended the statutory damages for leasing violations "to represent a civil penalty equivalent in dollar amount to that imposed on other creditors." S. REP. NO. 94-590 at 8 (1976).

Similarly, the 1995 amendment to § 1640(a)(2)(A) gave no indication that Congress intended to remove the $100/$1,000 limits from statutory damages for any TILA violations other than in transactions secured by real estate. Quite the opposite. This amendment did not alter any of the existing language of the statute in any material respect and simply added a new subpart (iii) specifying $200/$2,000 limits on statutory damages in individual actions relating to closed-end credit transactions secured by real property or a dwelling. The purpose of that amendment, as made clear from its legislative history, was simply to increase the statutory damage limits for a special category of TILA violations in transactions secured by real property or a dwelling. It is contradictory to suppose that Congress embarked on creating higher statutory damage limits for



TILA violations in connection with real estate transactions than for other TILA violations, only to end up removing the limits for the other violations entirely.

Where the legislative history of an amendment contains no hint that Congress intended to change it in a particular way, this Court has been reluctant to adopt the purported change absent a clear expression of intent to do so in the statutory language. *See Murphy Bros. v. Michetti Pipe Stringing*, 526 U.S. 344, 352-53 (1999). Neither the language nor the legislative history of the 1995 amendment to § 1640(a)(2)(A) exhibits any indication that Congress intended to remove the $100/$1,000 limits on statutory damages for violations covered by subpart (i).

### C. Construing Section 1640(a)(2)(A) To Apply The $100/$1,000 Limits To Statutory Damages For All TILA Violations, Except As Provided In Subpart (iii), Is Consistent With The Statute's Purpose And Avoids An Absurd Result.

"[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). If, in 1995, Congress had removed all limits on statutory damages for TILA violations, other than those in connection with consumer leasing and real estate transactions, it would have created an absurd situation in several respects.

In the retail motor vehicle industry, consumer leasing and consumer credit sales are alternative forms of financing the acquisition of a motor vehicle for a consumer. In a credit sale, the consumer owns the vehicle from the beginning of the date of the sale and pays monthly payments to a lender, which include a finance charge reflecting the cost of the credit extended to finance the sale.

In a consumer lease, the consumer does not own the vehicle, but has the right to possession of it during the term of the lease. In consideration of this right, the consumer makes monthly payments to the lessor which reflect both the amortization of the vehicle's decline in value over the lease term and a rent charge. 12 C.F.R. §§ 213.4(f)(5), (6).

The TILA disclosure requirements for consumer credit sale transactions are set forth in Regulation Z (12 C.F.R. Part 226). The disclosure requirements pertaining to consumer lease transactions are contained in Regulation M (12 C.F.R. Part 213), which has been promulgated by the Federal Reserve Board under the authority granted it by the Consumer Leasing Act. The requirements of Regulation Z and Regulation M are different because of the different nature of the credit transactions to which they apply. However, both regulations are highly technical and complex and create the inherent potential for unintentional violations of their requirements that cause very little, if any, harm to the consumers. Under § 1640(a)(2)(A), consumers can recover damages for such violations even if the failure to disclose caused them no harm and even if they, in fact, received a "windfall gain" from the TILA violation. *Cowen*, 70 F.3d at 940.

Although consumer credit sales and consumer leases are different types of transactions with different disclosure requirements, they serve the same fundamental purpose of allowing the consumer to pay for the ownership and/or possession of a vehicle over time. There is no evidence that Congress is, or should be, concerned with the potential of greater abuse of consumers in one type of transaction compared to the other.

The potential for unintentional TILA violations that cause little, if any, harm to consumers is the obvious reason for Congress' decision to impose limits on the amount of statutory damages that consumers can recover under



§ 1640(a)(2)(A). Without those limits, the potential statutory damages in both consumer credit sales and consumer leases would be extraordinarily high. In a consumer credit sale, the measure of damages, prior to application of any limits, is twice the amount of the finance charge, which as this case shows can be $24,000 or higher. In a consumer lease transaction, the measure of damages is 25 percent of the total monthly payments under the lease.

Because there is no indication that Congress is more concerned about abuse of consumers in connection with consumer credit sales than it is in connection with consumer leasing, it is reasonable to assume that Congress intends to make the statutory damages recoverable for TILA violations in both transactions somewhat comparable. The legislative history supports this assumption. When § 1640(a)(2)(A) was amended in 1976 to create statutory damages for violations of the newly created Consumer Leasing Act, the Senate report explained that the amendment created for consumer leases a civil penalty "equivalent in dollar amount to that imposed on other creditors." S. REP. NO. 94-590, at 8 (1976). There is no indication that Congress ever reached a conclusion that the statutory damages for violations in connection with consumer leases and consumer credit sales should not be equivalent.

However, if the 1995 amendment had, in fact, removed the $100/$1,000 statutory damage limits for TILA violations other than in connection with consumer leases and real estate transactions, the statutory damages for TILA violations in connection with consumer credit sales of motor vehicles would now be far higher than for consumer leases. Statutory damages for consumer lease violations would be capped at $1,000, regardless of whether the violation was intentional or caused significant harm to the consumer, while a dealer committing even an unintentional, technical violation of TILA in connection with a consumer credit sale of a motor vehicle would be required to pay statutory

damages equal to twice the finance charge in the transaction. In the present case, if the respondent had leased a vehicle from petitioner, instead of purchasing it on credit, the maximum statutory damages would have been $1,000. However, because the vehicle was financed through a consumer credit sale, the Fourth Circuit's majority opinion requires the petitioner to pay more than $24,000 in statutory damages. This result makes no sense.

Construing § 1640(a)(2)(A) as imposing unlimited liability for statutory damages equal to twice the finance charge in individual actions involving transactions other than consumer leases or those secured by real estate also makes no sense when the limitation on total liability in class actions is considered. Section 1640(a)(2)(B) limits total recovery in a class action arising out of the same failure to comply by the same creditor to "no more than the *lesser* of $500,000 or 1 per centum of the net worth of the creditor . . . . " (Emphasis added). The average net worth of a new automobile dealer in the United States at the end of 2002 was $2,230,699. NADA Data Average Dealership Profile at http://www.nada.org/content/navigationmenu/nadadata/ 20033/nadadata_profile.pdf (last visited April 8, 2004). Therefore, the total recovery of statutory damages in a class action against the average automobile dealer in this country is capped under § 1640(a)(2)(B) at $22,307, which is lower than the amount of statutory damages awarded to the respondent in this case. It is not reasonable to assume that Congress intended for the total recovery in class actions against a creditor to be less than what can be recovered by a single consumer in an individual action against the same creditor.

The Fourth Circuit's majority opinion's construction makes even less sense when one considers that, under it, if the respondent had given a security interest in his dwelling or other real property as security for the credit sale, the maximum statutory damages liability in this case would



have been $2,000, instead of $24,000. This would have converted the transaction to "a credit transaction not under an open end credit plan that is secured by real property or a dwelling" to which the $200/$2,000 limits on statutory damages under subpart (iii) would have been applicable. Under the Fourth Circuit's construction, a consumer credit sale secured by real estate has maximum statutory damages of $2,000, but one that is not secured by real estate can result in statutory damages of $20,000 or more. This cannot be what Congress intended by the 1995 amendments, particularly given the legislative history indicating that Congress believed that statutory damages should be higher in transactions where the consumer's dwelling or other real property was used as security.

On the other hand, applying the $100/$1,000 limits on statutory damages for all TILA violations except in transactions secured by a consumer's home or other real property is consistent with the statute's purpose without creating any absurd results. The purpose of statutory damages is to create an incentive for private enforcement of TILA violations in situations where no actual damages are caused by the violation. *Purtle,* 91 F.3d at 800, citing *Watkins v. Simmons & Clark,* 618 F.2d 398, 399 (6th Cir. 1980). Because statutory damages under § 1640(a)(2)(A) are accompanied by an award of attorney's fees under § 1640(a)(3), this incentive exists in both consumer leasing and consumer credit sale transactions even with a cap of $1,000. Because a successful claimant under TILA does not have to pay his or her own attorney and may recover up to $1,000, even without showing any actual damages, there is ample incentive for consumers to bring legal action when their rights under TILA have been violated. *See Cowen,* 70 F.3d at 941 (a suit over failure to disclose a $14 charge is not "a quixotic project" because "the plaintiffs, if they win would be entitled to statutory damages of $1,000 without any proof of injury . . .).

Therefore, retention of the $100/$1,000 statutory damage limits for all consumer credit transactions, other than those secured by real estate, promotes in the fullest manner the policy of the legislature in the enactment of § 1640(a)(2)(A) without creating an absurd result, and therefore should be the construction adopted by this Court.

## CONCLUSION

Based on the foregoing reasons and authorities, NADA respectfully asks that the Court reverse the Fourth Circuit's decision that the $100/$1,000 limits on statutory damages under 15 U.S.C. § 1640(a)(2)(A) do not apply to subpart (i) of that subparagraph.

Respectfully submitted,

PAUL R. NORMAN
*Counsel of Record*
BOARDMAN, SUHR, CURRY & FIELD LLP
One South Pinckney Street
Fourth Floor
Madison, Wisconsin 53703
(608) 257-9521

WILLIAM A. NEWMAN
JAMES MINNIS
NATIONAL AUTOMOBILE DEALERS ASSOCIATION
8400 Westpark Drive
McLean, Virginia 22102
(703) 821-7041

*Counsel for* Amicus Curiae *National Automobile Dealers Association*

April 2004